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No. 93-1318

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

TRANSCON LINES, ET AL.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC., THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AND THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Amici Curiae will address the following question:

Whether the filed rate doctrine precludes the Interstate Commerce Commission from enforcing credit regulations adopted for the protection of shippers under a directive in Section 10743 of the Interstate Commerce Act and under its mandate to "bring a civil action ... to enforce" its regulations in 49 U.S.C. Section 11702(a)(4).

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae are three national associations of shippers of freight. It is understood that their members, directly or indirectly, are responsible for routing most of the nation's freight. Virtually all of their members have been presented with so-called undercharge claims after motor carriers cease operating and typically years after the shipments were made. Claims for massive rate penalties for assertedly late payments, such as those

involved in this case, are one strain of the undercharge virus which has created an epidemic of cases inundating the judicial system.

Amicus Health and Personal Care Distribution Conference, Inc., is comprised of approximately 70 companies that ship health and personal care products nationwide via motor carriers. *Amicus* National Small Shipments Traffic Conference, Inc., is an association with approximately 450 shipper members, consisting of small and large companies shipping via motor carriers.

Amicus The National Industrial Transportation League is comprised of approximately 1,300 shippers and groups and associations of shippers conducting large, medium and small industrial and commercial enterprises in every state. Its members are substantial shippers of freight by motor carriers.

The issue presented by the holding below is of great importance to the *amici* because their members are included among the thousands of shippers being sued by the Trustee for Transcon Lines and by other nonoperating motor carriers for late payment penalties. These claims are being asserted in violation of the Commission's credit regulations, which on their face require advance notice of the prospective penalty on the freight bill and prompt follow-up with notice of late payments and of applicable penalty charges to lawfully impose such penalties. These *amici* were instrumental in the formulation and adoption of the credit regulations in order to protect the shipping public from exactly the type of claims presented to Transcon's customers by the Trustee. Because of their reliance upon these regulations, *amici* wish to present their views to the Court.

STATEMENT

The Trustee for Transcon Lines has brought hundreds of actions for asserted undercharge claims against its former shippers on the basis of a loss of discount rule in its tariff. The rule provided as to shippers whose freight shipments were delivered

on credit (*i.e.*, without payment upon delivery of freight), that when the freight bill is not paid within 90 days, the discounted tariff rate would no longer apply and a higher undiscounted tariff rate would become applicable. Transcon's rule also made explicit reference to the Commission's credit regulations, which allow discount forfeitures only under certain prescribed conditions. If applied, the penalty would be enormous because the undiscounted rates were typically double the discounted rate.

Notwithstanding the specific requirements in the Commission's credit regulations, Transcon (1) failed to include a statement on the initial freight bill that the charges shown thereon would be doubled if the bill was not paid within 90 days; and (2) failed to rebill the shipper for the full rate within 90 days. Thus, not only had its customers received no notice of the prospective penalty, but they had no way of knowing that their payments were late, because Transcon was not applying such a penalty while it was in operation. It remained for the Trustee to assert such claims after Transcon's demise as one part of a creative undercharge program, whereby it filed suits against over 300,000 former customers.

Because many of Transcon's late payment penalty suits in the bankruptcy court involved sums of money not adequate to support the cost of litigation, the Interstate Commerce Commission brought an action for an injunction to prevent Transcon from claiming late payment penalties in violation of its credit regulations. Transcon had not only not complied with the freight bill notice requirement but also had not complied with the other prerequisites, *i.e.*, rebilling within 90 days after the failure to pay and individual rebillings rather than amassing bulk collection claims. Thus, literally every one of Transcon's suits for late payment penalties was brought in direct contravention of the Commission's regulations.

The history of this case is presented in detail in the original opinion of the court below and in its Order after remand from

this Court. This Court previously granted certiorari, vacated the Ninth Circuit's judgment in *ICC v. Transcon Lines*, 990 F.2d 1503 (9th Cir. 1992), and remanded for further consideration in light of its decision in *Reiter v. Cooper*, 113 S.Ct. 1213 (1993). *I.C.C. v. Transcon Lines*, 113 S.Ct. 2955 (1993). Thereafter, the court of appeals, fearing that enforcing the credit regulations would somehow "open an end-run around the filed rate doctrine," reinstated its original ruling to affirm the summary judgment in favor of the Trustee, *ICC v. Transcon Lines*, 9 F.3d 64 (9th Cir. 1993). The court of appeals enigmatically noted in its opinion that this would leave "the ICC sufficient authority to enforce its credit regulations by other means." (9 F.3d at 67, Pet. App. 9a.)

It is important to provide some background regarding the involvement of *amici* in this saga. Historically, the credit regulations of the Commission did not allow a loss of discount penalty for late payment and the carriers (quite properly, we believe) were limited to interest on the amount owed. During the years 1986-1989, at the instance of the American Trucking Association as representative of the trucking industry, the Commission conducted a rulemaking to determine whether it should authorize late payment penalties in the form of forfeiture of the discount rates then becoming pervasive. *Amici* were the leading shipper parties to that proceeding. They were appalled by the nature of this type of penalty and how it would operate inversely to the amount of money owed to the carrier. For example, if the base rate were $100 and the discount 10 percent, the late payment forfeiture on the delinquent $90 freight bill would be $10. Conversely, at the base rate of $100 and a discount of 50 percent, the late payment forfeiture on the delinquent $50 freight bill would be $50.

The Commission first adopted a rule which would countenance such gross and inequitable loss-of-discount penalty provisions in *Regulations for Payment of Rates and Charges*, 4

I.C.C. 2d 340, 345-47 (1988).[1] *Amici* were then faced with either pursuing an appeal or seeking to have protections included in the rule so as to provide shippers with actual notice of the prospective penalty for late payment. The revised credit regulations under consideration in this case were specifically adopted by the Commission to prevent carriers from aggregating large penalties on bills which gave no notice of the penalty (as required by 49 C.F.R. § 1320.3(c)) or where the penalty was not brought to the attention of the shipper by rebilling within 90 days, in order to avoid recurrent late payments (as required by 49 C.F.R. § 1320.2(g)(2)). *Regulations for Payment of Rates and Charges*, 5 I.C.C. 2d 691 (1989).

These specific revised regulations were adopted by the Commission at the instance of *amici* and with the joint sponsorship of the American Trucking Associations, 5 I.C.C. 2d at 691. Shippers certainly did not expect that after they had relied on the protection of these regulations for several years, a court would now say that they are ineffective to serve their only purpose, or that the Commission could not obtain an injunction to enforce them.

SUMMARY OF ARGUMENT

The ICC's credit regulations were intended to permit carriers to recoup legitimate collection expenses while providing timely notice to shippers of their late payments and their exposure to penalty charges. However, because of Transcon's admitted violations of those regulations, it had no collection expenses in most cases. For their part, though most shippers paid Transcon's original freight bills in full, they may have paid late, in ignorance of the payment deadline and of Transcon's severe loss-of-discount penalty. Transcon's violations thus

[1] As relevant here, the only significant measure taken by the Commission to protect shippers from abusive undercharge claims in the 1988 version of its credit regulations was a prohibition against the assertion of aggregate balance-due claims on past shipments. 4 I.C.C. 2d at 349.

thwarted *both* of the intended goals of the credit regulations. To address these violations and to prevent a $15 million windfall to Transcon, the ICC sought injunctive relief.

In rejecting the ICC's position, the Ninth Circuit embraced an interpretation of the filed rate doctrine so extreme as to reward Transcon for its violation of ICC regulations. In the view of the Ninth Circuit, this result is mandated by prior law which it reads as according absolute legal supremacy to tariffs. The court of appeals could not be more wrong.

In the first place, the Ninth Circuit's analysis rests on a conception of the factual context of this case that is the reverse of reality. Ignoring a *real* parade of horribles, in which this carrier laid a trap and then sued hundreds or thousands of former shippers after bankruptcy, the court concocts a scenario in which Transcon engages in a conspiracy with shippers whose apparent goal is nonpayment of freight bills, with the ICC's blessing. This makes no sense, as all the rates originally billed were shown in Transcon's filed tariffs.

The court below also claims support for its position in *Maislin Industries U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *Reiter v. Cooper*, ___ U.S. ___, 113 S.Ct. 1213 (1993). However, these decisions do not support the Ninth Circuit's position. *Maislin* preserved ICC unreasonable practice jurisdiction where, as here, the question is which of two filed rates to apply. *Reiter v. Cooper* made it clear that the filed rate doctrine does not supersede other provisions of the Interstate Commerce Act.

Finally, the Ninth Circuit fails to consider the law in the context of other tariff-related decisions since 1980. In particular, this Court has issued a line of decisions establishing that the ICC remains the primary arbiter of carrier conduct in today's more competitive environment. And other courts have issued decisions that cannot be reconciled with the decision below.

The Ninth's Circuit's position is not just wrong, but dangerously wrong. It relegates duly promulgated agency regulations to a position of being completely vulnerable to contravention by carriers choosing not to abide by them. The decision below must be reversed.

ARGUMENT

I. THE NINTH CIRCUIT'S RATIONALE EFFECTIVELY STRIKES THE CREDIT PROVISIONS FROM THE INTERSTATE COMMERCE ACT

The Interstate Commerce Act *prohibits* carriers from extending credit to their shippers for paying freight bills except "*under regulations of the Commission.*" 49 U.S.C. § 10743. Compliance with the regulations is thus mandated by Congress for *any* extension of credit. The specific regulations that Transcon violated were adopted expressly to prevent credit provisions in carrier tariffs from becoming the very trap for the unwary that Transcon has now sprung.

Where the carrier notes its loss-of-discount penalties on its freight bills and rebills for the higher penalty amounts within 90 days after expiration of the authorized credit period, the shipper is put on notice of the penalty and of its failure to meet the specified payment date. If the shipper receives notice that it has paid a bill late, it can take corrective action and prevent the accumulation of a large penalty balance. The practical impact of the Ninth Circuit's decision is that a carrier can stand by and accumulate three years of bills before it goes bankrupt, without telling the shipper along the way that any payment arrived late.

Thus, this case does not involve a minor or inadvertent deviation from some technicality in the Code of Federal Regulations. As to all its shippers, Transcon consistently ignored *all* the key requirements of the regulations governing imposition of the additional penalty charges it seeks to collect. Yet the

Commission's credit regulations were the sole authorization under the statute for Transcon's 90-day credit penalty.

The Ninth Circuit's decision hinges upon its misreading of this Court's decision in *Maislin* and a disregard of *Reiter*, along with other relevant authorities. Ultimately, rather than approaching the Interstate Commerce Act as a balanced system of regulation and allowing its various provisions to coexist harmoniously, the Ninth Circuit viewed its task as:

> ...to decide which of two competing statutory claims should have priority: the carrier's claim based on the filed rate doctrine, or the ICC's claim based on the credit provisions.
>
> In deciding which provision should be given priority, we take guidance from the Supreme Court's affirmation in *Maislin* of the vital importance of the filed rate doctrine to the ICA.

9 F.3d at 67; App. 5a to ICC Petition. And in the same vein: "*Reiter* at most requires us to resolve a clash of two statutory claims." (9 F.3d at 67; App. 8a to ICC Petition.)

Certainly, the filed rate provision and the credit provision, including its directive that the ICC issue controlling credit regulations, are both part of the same Act, along with the requirement that carrier rates and practices be reasonable. But the Act was written by Congress to be enforced as a whole, with all its provisions given effect in accordance with established principles of statutory construction. *Moskal v. United States*, 498 U.S. 103, 110-111 (1990).

All the rates to which the credit provision and the implementing ICC regulations apply are "filed rates," so Congress understood that it was not detracting from filed rates when it included credit provisions in the ICA. What the Ninth Circuit lost sight of is that both the rates initially charged by Transcon (all the thousands of discount rates in its rate tariff) as well as

the undiscounted bureau rates in another tariff are likewise "filed rates." This is not a *Maislin* situation where the rate rejected by the court of appeals was unfiled.

In pursuit of a mistaken conception of the filed rate doctrine, the decision below negates utterly the specific authority which Congress delegated to the ICC. If, as the court opines, a rule inserted by a carrier into its tariffs can exempt it from the operation of the ICC's regulations, then carriers would be vested with the power to overrule the ICC in the discharge of a function specifically given it by statute. And, since all the rates to which the credit provision and regulations apply are filed rates, a carrier would hold a veto power over the ICC's credit regulations as to all its rates, exercisable simply by applying its tariff as if the rates apply independently of and whenever contrary to the ICC's rules. In effect, compliance with the ICC's rules would become optional on the part of the carrier and Congress' intent to regulate carriers' credit terms would be defeated.

The court erred not only by reading into the filed rate provision a power of the carrier to veto the ICC's regulations but also in treating the credit regulation as somehow substituting "secret" rates for filed rates and thereby transgressing *Maislin* (where this Court's choice was in favor of a filed rate and against an unfiled rate):

> This result [enforcing ICC credit regulations] would permit an end-run around the filed rate doctrine. A carrier and shipper could privately negotiate a discount from the filed rate. The carrier would purposely violate various credit regulations such as 49 C.F.R. 1320.3(c) which requires the original bill to the shipper to carry a notice of the penalty for late payments. If the ICC goes along, then the filed rate doctrine would be gutted. Neither the carrier nor the shipper would protest the arrangement that they themselves have negotiated. If the ICC looks the other way, only

> after a carrier goes bankrupt would the illegal discount be brought to light. But because the carrier intentionally failed to give notice to the shipper the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and the shipper.

9. F.3d at 66-67; App. 6a to ICC Petition.

The court was utterly out at sea in fashioning its hypothesis. All the discount rates at stake in this case (there are thousands of them in Transcon's tariff and all are placed at risk by the Ninth Circuit) are filed tariff rates and not "privately" made discounts. And any rate subject to the ICC's credit regulations would have to be a filed rate visible to the public (the credit regulations apply only to filed tariff rates). The Ninth Circuit suggests that the carrier might "purposely violate various credit regulations". But that is exactly what happened here: Transcon inserted a loss of discount trap in its tariff rule but did not give the actual notice of that prospective penalty on any of its freight bills, in direct contravention of the ICC's rules.

Next, the court laments that "If the ICC goes along, the filed rate would be gutted.... If the ICC looks the other way ... the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and shipper." This is completely at odds with the undisputed facts of this case or any other case where a loss of discount provision might be exercised. There was no "illegal bargain struck by the carrier and shipper," as the discount rates originally billed were published in the tariff. As the shipper was not given the notice required by the Commission that a penalty was due, there is no joint effort of any sort between the shipper and carrier, either publicly or privately. Any attempt to enforce a loss of discount/late-payment penalty is entirely a unilateral operation by the carrier or its trustee-successor.

There is also certainly no occasion for the ICC to "look the other way." The ICC does not receive copies of the carrier's freight bills and would not know that the carrier was not giving the requisite notice to its shippers, until after a suit is brought by the carrier. Finally, the only illegality perpetrated in this scenario is by the carrier, initially by failing to comply with the regulation requiring actual notice of the prospective penalty on the freight bill and again later by issuing claims for a credit penalty (the full undiscounted rate) in direct violation of the ICC's credit regulations.

II. THE DECISION OF THE NINTH CIRCUIT IS CONTRARY TO THIS COURT'S DECISIONS

The essence of the Ninth Circuit's position is that while the ICC may have been given extensive enforcement powers by Congress as to carriers under its jurisdiction, the filed rate doctrine puts the rates in carriers' tariffs beyond the reach of those powers. The court's theory is that once a rate is filed, the ICC may adjudicate its reasonableness if it is challenged by a shipper, but may not otherwise interfere with the carrier's collection of the rate, no matter how egregious the carrier's conduct.

The Ninth Circuit relied for this understanding of the law almost entirely on *Maislin*, and its understanding of *Maislin* was unshaken by this Court's remand for reconsideration in light of *Reiter v. Cooper*. To the court below, *Reiter v. Cooper* merely clarified *shippers'* rights under the caveat to the filed rate doctrine noted in *Maislin*.[2] However, the Ninth Circuit recognizes no caveat for the credit provision in the same Act.

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[2] "The filed rate doctrine, howe .er, contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable." See *Maislin*, 497 U.S. at 128.

As will be seen, this analysis is not supported by *Maislin* itself, and the Ninth Circuit's narrow focus on the procedural aspects of *Reiter v. Cooper* has blinded it to that decision's substantive lesson, *viz.*, that the other provisions of the Interstate Commerce Act are not merely window dressing for the filed rate doctrine.

Amici would also point out that *Maislin* and *Reiter* are two in a succession of five important decisions on carrier tariffs issued by this Court since the 1980 amendments to the Interstate Commerce Act. Read together, these decisions leave no doubt as to the Ninth Circuit's error.

A. *Commercial Metals*

In *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982) the Court squarely recognized that the ICC credit regulations promulgated under 49 U.S.C. § 10743(b) are included within the regulations that the Commission may enforce by seeking a civil injunction. The Court stated "that the ICC has ample authority to police the credit practices of carriers and thereby to deter improper practices. This authority includes ... the power to seek a federal-court injunction requiring a carrier to comply with the regulations...." The Court made that statement in the context of pointing out that, by refusing to allow a shipper to use a carrier's admitted violation of the ICC's credit regulations as an affirmative defense in the carrier's action to collect the filed tariff rate, it was not leaving the carrier free to violate those regulations with impunity. 456 U.S. at 349.[3]

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[3] The Commission's enforcement authority is set forth in 49 U.S.C. § 11702(a)(4). The current section is a recodification, without substantive change, of former 49 U.S.C. § 322(b), authorizing the Commission to seek enforcement "by writ of injunction or other process, mandatory or otherwise."

The identical principle must be applied here, where one of the key questions is whether the application of the ICC's authority to seek a court injunction to enforce its credit regulations may have the effect of indirectly preventing the collection of the filed rate. Plainly, the existence of the ICC's express statutory power to seek and obtain civil injunctions against violations of regulations adopted by the Commission to implement the statutory policies of 49 U.S.C. § 10743(b) establishes the power of the Commission to condition, if necessary, the application of the filed rate doctrine.

To the extent that there are differences between this case and *Commercial Metals*, they compound the Ninth Circuit's error. For example, in *Commercial Metals*, the Court noted that the regulations themselves did not provide that a carrier violation precluded collection. The current regulations do prohibit collection of *penalty* charges where the carrier has violated the credit rules. See, *e.g.*, 49 C.F.R. § 1320.2(g)(iii) and (vi). The first of these subsections states that the penalty "shall be applied only to the nonpayment of original separate and independent freight bills and shall not apply to aggregate balance-due claims sought for collection on past due shipments by a bankruptcy trustee, or any other person or agent." Subsection (vi) permits collection "only" where the 90-day rebilling requirement has been met.

It is also important to note that in *Commercial Metals* the shipper was trying to use the carrier's violation of the credit rules as an excuse for paying no freight charges to the carrier. In *Transcon*, freight charges have already been paid, and the issue concerns the carrier's desire to collect a penalty on top of those charges despite its violations of ICC regulations. *Transcon* is, therefore, akin to the double-payment cases that this Court recognized in *Commercial Metals* as an exception to the rule. 456 U.S. at 351. See also *Olson Distributing Systems, Inc. v. Glasurit America, Inc.*, 850 F.2d 295 (6th Cir. 1988), holding

the carrier equitably estopped in a double payment case where its delays in pursuing collection deprived the shipper of notice of the accumulation of charges and led to an escalation of the loss.

B. *ICC v. ATA*

Two years after deciding *Commercial Metals*, this Court decided *ICC v. American Trucking Associations*, 467 U.S. 354 (1984). The Ninth Circuit was plainly aware of *ATA*, citing it in its first decision (990 F.2d at 1514) for the proposition that "[t]he ICC has broad powers to shape remedies for the violation of its rules." But the court of appeals went on to state (*id.*): "[t]he case, however, is different when the ICC seeks an injunction applying its regulations in such a way as to undercut the filed rate requirement. Then *Maislin* governs." The fallacy in this reasoning is that *ATA* itself approved the ICC's exercise of its broad powers "in such a way as to undercut the filed rate requirement." This Court there upheld the Commission's decision that it could retroactively invalidate carrier tariffs.

Indeed, in many respects the ICC's action sustained in *ATA* went far beyond the enforcement action rejected in the decision under review. In *ATA*, the only statutory basis for the Commission's action was 49 U.S.C. § 10321(a), stating generally that the ICC's powers are not limited to those enumerated in the Act. Here, as explained above, Congress explicitly made carriers' credit practices subject to ICC regulations.

Moreover, *ATA* upheld the Commission's power to invalidate tariffs retroactively. 467 U.S. at 364-66. In this case, the ICC regulations took effect long *before* the violations the Commission seeks to enjoin, and those regulations are actually cited in Transcon's tariff item. There is nothing retroactive, or unfair, about requiring carriers to abide by regulations after they take effect. Nor does the ICC seek to "invalidate" Transcon's tariff. If Transcon had complied with the regulations, no injunction

would have been sought, and the only issue in Transcon's undercharge cases would be whether its penalty charges were unreasonably high. Their applicability would be undisputed.[4]

C. *Maislin*

The next in this line of cases was *Maislin*. To be sure, this Court there made clear that the ICC's unreasonable practice jurisdiction was insufficient to elevate unfiled rates to a status of legal parity with filed rates, in the face of the filed rate doctrine.[5] However, even read in isolation, *Maislin* does not lead inexorably to the Ninth Circuit's conclusion.

In its original decision below, the Ninth Circuit stated:

> The ICC also has the initial responsibility of determining if ... 'the practice' of a carrier, as distinct from a rate, is unreasonable, 49 U.S.C. § 10704(b)(1). The interplay of the last statute with the filed rate doctrine was at issue in *Maislin*, which reaffirmed the primacy of the filed rate doctrine. *Id.* at 130, 110 S.Ct. at 2768.

990 F.2d at 1512. (In addition to Section 10704(b)(1), the ICC's unreasonable practice jurisdiction is also derived from 49 U.S.C. § 10701(a).)

This discussion fails to recognize that in the cited portion of *Maislin*, the Court was considering only *unfiled* rates. But on

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[4] It is also worth nothing that the risk of massive overcharge claims against carriers, noted with concern in the dissenting opinion in *ATA*, has given way to a risk of massive undercharge claims by carriers, under the decision below. In today's competitive environment, overcharge claims are virtually nonexistent.

[5] The Court recognized the potentially harsh results of this position but said the remedy lies with Congress. 497 U.S. at 135-36. It is worth noting that Congress has since partially overruled *Maislin* in the Negotiated Rates Act of 1993, reviving the "negotiated rates" defense for undercharge claims on shipments prior to September 30, 1990. See Section 2(e) of the NRA, now printed in the Historical and Statutory Note following 49 U.S.C. § 10701.

the previous page of *Maislin*, 497 U.S. at 129, the Court had made clear that ICC unreasonable practice jurisdiction survives in cases involving a determination, as here, of which of two *filed* rates is controlling. This distinction is developed at some length in footnote 11, where the Court states "None of our cases involving a determination by the ICC that the carrier engaged in an unreasonable practice has required departure from the filed tariff schedule altogether; instead they have required merely the application of a different filed tariff."[6]

Here, Transcon relied on published tariffs for both of the rates at issue — the original discount rate and the far higher undiscounted class rate claimed as a penalty after the shipper was late in paying the discount rate. The ICC did not challenge the reasonableness of either rate, and admitted that there were no technical tariff filing infirmities. The vice the Commission sought to control was Transcon's cavalier disregard of regulations governing which of the two tariff rates would apply. Correctly read, *Maislin* supports the application of the ICC's unreasonable practice jurisdiction in such cases.

D. *Reiter v. Cooper*

It was on just these grounds that the ICC and shipper *amici* sought review by this Court of the Ninth Circuit's first credit rules decision, and *amici* were optimistic that the court of appeals would see its error after this Court summarily vacated that decision and remanded for reconsideration in light of *Reiter v. Cooper*. Yet the court of appeals ignored the teaching of

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[6] In support of this observation, the Court cited several cases, of which the first was *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962), a case recognizing a shipper's right to seek relief from higher rates resulting from carrier misrouting. Notably, one benefit the Court cited was that allowing shippers their day in court would "minimize 'cease and desist' proceedings before the Commission." By its efforts to enjoin Transcon's violations here, the ICC sought to preclude duplicative litigation in the courts.

Reiter that there are other substantive provisions of the ICA which must be carried out beyond the filed rate provision:

> The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. See *Texas & Pacific R. Co. v. Mugg*, 202 U.S. 242, 245 (1906); *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 98 (1915); *Pittsburgh, Co., C. & S. L. R. Co. v. Fink*, 250 U.S. 577, 581-582 (1919). It assuredly does *not* preclude avoidance of the tariff rate, however, through claims and defenses that are specifically accorded by the ICA itself. We can agree with respondents that this latter category does not include any "unreasonable-rate defense," derived from the general ICA requirement (now codified in § 10701(a)) that a carrier's rates be "reasonable." See *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 468-472 (1959). But we cannot agree that the filed rate doctrine precludes shippers from asserting (by way of claim *or* counterclaim) the reparations rights explicitly conferred by § 11705(b)(3).

113 S.Ct. at 1219, emphasis in original.

This case is an even more compelling one than *Reiter* for applying the protective provisions of the Interstate Commerce Act. In *Reiter*, there was no question that the filed rate was applicable, but the shipper was seeking to pay a lower unfiled rate on the ground that the filed rate was unreasonable. Here, there are two filed rates: the discount tariff rate billed by the carrier, and a higher penalty rate that, by statute and by regulation, could *only* be collected in compliance with ICC regulations.

The court of appeals would adroitly dispose of *Reiter* by reading it narrowly as recognizing only those sections of the

Interstate Commerce Act which directly confer defenses on shippers and not those sections which indirectly protect shippers through action taken by the Commission. But the thrust of *Reiter* is that there are substantive provisions in the ICA which must be given effect, and are not necessarily to be subordinated to the filed rate provision. As the D.C. Circuit noted in *Towns of Concord, etc. v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992), "The filed rate doctrine does not have a life of its own. Its application depends on the underlying statute."

Here there is a statutory scheme which limits credit sanctions to only those prescribed in regulations by the Commission. Thus, the imposition of a credit penalty for late payment is subject to two statutory requirements, not just one: (1) it must be published in a tariff, *and* (2) the carrier must comply with the ICC's credit regulations, including the requirements for actual notice to shippers.

In yet another key respect, this case is a more compelling one than *Reiter v. Cooper* for affording the protection of the Interstate Commerce Act to shippers. It is important to note the language of Transcon's tariff provision which the Trustee relies upon to reject the discount rate and collect the higher undiscounted rate:

> 1. [D]iscounts *** shall apply when tariff charges are paid within 90 calendar days from date of shipment.
>
> 2. The provisions of this rule do not change the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with ICC regulations, 49 CFR 1322 [*sic*, 1320]. This rule simply establishes a condition precedent for the application of the specific tariff provisions described in paragraph 1 above.

Transcon's tariff thus incorporated by reference the ICC's credit regulations. While the shippers and the ICC would maintain that the terms of the ICC's credit regulations apply whether or not the carrier chose to reference them in its tariff, here there can be no question that the prerequisites of the credit regulations apply because Transcon explicitly incorporated these rules into its tariff.

E. *Kmart*

This Court most recently considered the issue of applying ICC regulations in conjunction with the filed rate doctrine in *Security Services, Inc. v. Kmart Corporation*, 62 U.S.L.W. 4329 (May 16, 1994). In that case, the bankrupt carrier sought to collect higher rates on the basis of mileage rates published in its filed tariff and mileages published in the Household Goods Carriers' Bureau Mileage tariff. Both the tariff rates and the tariff mileages were on file with the ICC, just as Transcon's discount rates and undiscounted rates were on file in this case.

As held in *Kmart*, since the ICC's regulations required not only that the mileage tariff be on file but also that the carrier referencing those mileages be a qualified participant in that tariff, the application of the ICC participation regulation made the mileage rate tariff void as to this carrier.

Notably, while in *Kmart* the higher rate was in the tariff and included a reference to the mileage tariff, it was the Commission's regulations which made those rates inapplicable due to the carrier's failure to participate in the mileage tariff as required by those regulations, through an effective concurrence or power of attorney:

> The Commission's void for-nonparticipation regulation provides that "a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers

> of attorney, tariffs are void as a matter of law." Sec. 1312.4(d).

62 U.S.L.W. at 4330-31.

There is a direct analogy to this case. Here the loss of discount rule on its face purported to take away the discount in 90 days, but the ICC's credit regulations made it a prior condition to the application of such penalty that the carrier give notice of the penalty on the freight bill. None was given, so that the rate penalty was void under the regulation.

Here, as in *Kmart*, the argument of the Trustee (and the Ninth Circuit) against the injunction to enforce the credit regulations is not that those regulations are unauthorized by statute or ultra vires, but rather that the application of the rule in this instance is contrary to law because it would transgress the filed rate doctrine. This Court encountered and dismissed that argument in its opinion in *Kmart*:

> Petitioner's argument in that action is that the Interstate Commerce Act "prescribes the remedies available to Kmart," *id.*, at 17, not that the regulation is ultra vires. Indeed, at oral argument, counsel for petitioner stated that the ICC's void-for-non-participation rule "is authorized. The rule is proper, but the application of the rule ... is contrary to law." Tr. of Oral Arg. 17.

62 U.S.L.W. at 4332, n. 6.

In essence, if Transcon's penalty item is read as incorporating the Commission's credit regulations into it (as developed above), then by its necessary terms the penalty item is properly qualified so as not to apply when notices are not given to shippers. In other words, the penalty item is in the tariff and is valid, but only applies under the appropriate circumstances. Conversely, if the penalty item is read as the Ninth Circuit read

it, *i.e.*, that the discount is lost without giving notice, then the item is void *ab initio*. As stated in *Kmart*:

> The regulation does not require any ICC "retroactive rejection" of a filed rate, or indeed any agency action at all. The regulation works like an expiration date on an otherwise valid tariff in voiding its future application, in accordance with § 1312.23(a).... We thus disagree with the Court of Appeals for the District of Columbia Circuit, which held that once a tariff is in effect, a regulation that voids the tariff operates retroactively.

62 U.S.L.W. at 4332.

In construing tariffs, it is appropriate to read them so as to be legal. In this instance, Transcon's penalty item would only be legal if read as incorporating the Commission's credit regulations as necessary conditions to its applicability. Indeed, the specific reference to the credit regulations in the item itself confirms that interpretation. On the other hand, if the item is read as meaning that the loss of discount penalty was intended to apply despite the carrier's failure to give shippers the notice required in the credit regulations, then Transcon's item must be deemed void *ab initio*. Otherwise, the statute would be read as creating a situation of anarchy whereby the regulations of the regulatory agency, which the shippers read into the tariff as applicable law and were entitled to rely upon, could be disregarded at the lawless whim of the carrier. Surely that was not intended by Congress when it placed this industry under regulation and directed the Commission to issue regulations concerning credit provisions.

III. THE DECISION BELOW IS IRRECONCILABLE WITH DECISIONS BY OTHER COURTS

The Ninth Circuit cites remarkably little case law in support of its extraordinary decision to subordinate a regulatory agency's regulations to the filed rate doctrine. Aside from *Maislin* and *Reiter*, discussed above, the Ninth Circuit relies most heavily on the three court of appeals decisions upholding the carriers' position in mileage guide claims cases.[7] But these decisions are no longer good law after *Kmart*. In fact, two of them have been summarily vacated by this court. 62 U.S.L.W. 3768 (May 23, 1994).

Amici would point out, however, that there are other relevant court of appeals and lower court decisions that warrant a brief discussion. Transcon was not the first bankrupt carrier to file undercharge claims based on the allegation that its former shippers paid freight charges after expiration of the credit period. And, if the decision below is not reversed, the number of such cases will increase. Any bankrupt carrier that has not asserted such penalty claims because of its violation of ICC credit regulations would then be invited to resurrect all such claims, and the lure for other carriers of tariff traps like Transcon's would become irresistible.

The leading case in the lower courts on the issue of violations of ICC credit regulations in an undercharge case involved The Mennen Company, a member of *amicus* The Health and Personal Care Distribution Conference, Inc. Asserting that the bankrupt carrier's claims were invalid due to credit rule violations, Mennen obtained referral of the issue to the ICC under the doctrine of primary jurisdiction; and the Commission found such violations to be unreasonable practices in violation of the

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[7] See 9 F.3d at 66-67, citing *Overland Express, Inc. v. ICC*, 996 F.2d 356 (D.C. Cir. 1993); *Security Services, Inc. v. P-Y Transportation, Inc.*, 3 F.3d 966 (6th Cir. 1993); and *Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993).

Act. *The Mennen Co. v. Campbell 66 Express, Inc. and Delta Traffic Service Inc.*, Docket No. MC-C-30135 (Aug. 28, 1989) (1989 WL 239321 I.C.C.). The District Court subsequently granted summary judgment for the shipper, affirming the ICC's decision, and the Third Circuit affirmed in an unpublished opinion. *Delta Traffic Service, Inc. v. Mennen Co.*, 730 F.Supp. 1309 (D.N.J.), *aff'd.* 919 F.2d 134 (3d Cir. 1990).

Summary judgment based on a similar ICC decision in *ADM of Mississippi, Inc.*, 1990 Fed. Carr. Cas. (CCH) ¶ 37,834 (1990 WL 287541 I.C.C.) was affirmed in an unpublished decision by the Fifth Circuit in *Delta Traffic Service, Inc. v. ADM of Mississippi, Inc.*, No. 91-1098 (5th Cir. 1992).

Though no other courts of appeals have addressed the issue, similar conclusions have been reached in federal district court cases. See, *e.g.*, *Delta Traffic Service, Inc. v. Purdue Frederick Co.*, 1989 Fed. Carr. Cas. (CCH) ¶ 83,508 (D.Conn. 1989) (referring the credit rules issue to the ICC and citing similar decisions in the District of Delaware and the District of Indiana). The ICC also addressed the credit rules issue and found violations in cases referred by district courts in the Districts of New Jersey and Ohio. See the Commission decisions published at 1990 Fed. Carr. Cas. (CCH) ¶ 37,776 and 1992 Fed. Carr. Cas. (CCH) ¶ 37,951 (1991 WL 259987 I.C.C.).[8]

The most recent decision is *Lifschultz Fast Freight, Inc. v. National Manufacturing Co.*, 804 F.Supp. 1059 (N.D. Ill. 1992), the first post-*Transcon* decision dealing with undercharge claims involving penalties claimed in violation of ICC credit regulations. The court explained (804 F.Supp. at 1064):

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[8] A corporate affiliate of Transcon, a bankrupt carrier formerly known as PIE Nationwide, Inc. has filed 30,000 undercharge actions, a number of which involve loss of discount claims. One such case is pending before the ICC on referral by the district court. *Fidelcor Business Credit Corp. v. Dillard Department Stores*, 1992 Fed. Carr. Cas. (CCH) ¶ 83,753 (M.D. Fla. 1992)

> To hold as the court did in *Transcon* in effect renders meaningless all the conditions to an extension of credit in 49 C.F.R. 1320-29. The regulations outlined by the ICC pursuant to its granted authority must be complied with before a carrier can invoke a loss-of-discount remedy. Otherwise, the ICC is stripped of authority as granted by Congress in the Interstate Commerce Act.

The Ninth Circuit brushed aside the contrary decisions of the Third and Fifth Circuits, saying they were unpublished and concerned tariff penalty provisions adopted when ICC credit regulations did not permit such penalties. But this distinction makes no sense. Tariffs either supersede regulations or they don't. If loss of discount penalties were formerly unlawful because not permitted by the ICC's prior credit regulations, restrictions on such penalties in the current regulations must also be given effect.

Nothing in this Court's prior decisions precludes trial courts from granting stays to permit the ICC to consider, in the exercise of its primary jurisdiction, whether a carrier's claim for penalty charges in violation of the Commission's credit regulations is an unreasonable practice or results in unreasonable charges. This procedure is entirely consistent with *Reiter v. Cooper* and *Maislin* and should remain available in cases where the ICC does not seek injunctive relief. However, there is no reason for courts and parties to have to go through this procedure in thousands of individual cases if the Commission undertakes to enforce its regulations by means of a court injunction. The injunction procedure, which conserves court, Commission and party resources, is provided for by the Act and by *Commercial Metals*.

CONCLUSION

For the reasons set forth above and in the brief of the Interstate Commerce Commission, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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